Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of prosecution by a foreign country.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-50a) is reported at 119 F.3d 122. The opinion of the district court (App. 53a-80a) is reported at 918 F. Supp. 588.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1997. A petition for rehearing was denied on September 25, 1997. App. 51a-52a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

In 1993, the Department of Justice issued an administrative subpoena requiring respondent Aloyzas Balsys, a resident alien born in Lithuania, to appear for a deposition to answer questions relating to his activities in Europe during World War II and his immigration to the United States. At his deposition, respondent invoked the Fifth Amendment privilege against compelled self-incrimination and refused to answer any questions about his wartime activities or his immigration to the United States. The district court granted the government's petition to enforce the subpoena. App. 53a-80a. The court of appeals vacated the district court's order and remanded for further proceedings. App. 1a-50a.

1. Respondent is a resident alien of Lithuanian nationality. On May 2, 1961, he submitted an application for an immigrant visa and alien registration at the American Consulate in Liverpool, England. On his application, he stated that he had served in the Lithuanian army between 1934 and 1940, and that he had lived in hiding in Plateliai, Lithuania, between 1940 and 1944. He swore under oath that the answers on his immigrant visa application were true and correct. App. 3a, 54a.

Based upon those answers, respondent was granted an immigrant visa. On June 30, 1961, he immigrated

to the United States from England pursuant to the Immigration and Nationality Act, 8 U.S.C. 1201. He currently resides in New York. App. 3a, 54a.

The Office of Special Investigations of the Department of Justice (OSI) is investigating whether respondent illegally obtained admission to the United States by concealing assistance in Nazi persecution during World War II. OSI suspects that respondent was neither living in Plateliai, Lithuania, nor in hiding between 1940 and 1945. Rather, OSI suspects that he was living in Vilnius, Lithuania, and was a member of the Lithuanian Security Police, known as "Saugumas," which persecuted Jews and other civilians in collaboration with the Nazi government of Germany. App. 3a; Gov't C.A. Br. 3-4. If respondent did assist the forces of Nazi Germany in persecuting persons because of their race, religion, national origin, or political opinion, he would be subject to deportation under 8 U.S.C. 1182(a)(3)(E) and 1227(a)(4)(D). He would also be subject to deportation under 8 U.S.C. 1182(a)(6)(C)(i) and 1227(a)(1)(A) for lying under oath on his immigrant visa application about his activities during World War II. See App. 3a.

In 1993, OSI issued an administrative subpoena requiring respondent to appear for a deposition and to produce documents relating to his activities in Europe between 1940 and 1945 and to his immigration to the United States in 1961. At his deposition, respondent refused to answer any questions concerning his wartime activities or his immigration to the United States. He claimed that he had a right not to do so based on the Fifth Amendment privilege against compelled self-incrimination. He did not contend that his responses to OSI's inquiries could incriminate

him in any domestic prosecution.[1] Rather, he contended that those responses could subject him to prosecution in Lithuania, Israel, and Germany. App. 3a-4a, 55a, 57a; Gov't C.A. Br. 4-5.[2]

The government filed a petition for enforcement of the subpoena pursuant to 8 U.S.C. 1225(a) (1994). The district court granted the petition and ordered respondent to testify. App. 4a-7a, 53a-80a. Although the court found that respondent "faces 'a real and substantial' danger of prosecution by Lithuania and Israel," App. 70a, the court held that respondent could not invoke the Fifth Amendment privilege to avoid giving testimony that would incriminate him solely in a foreign prosecution, App. 71a-78a

2. The court of appeals vacated the district court's order enforcing the administrative subpoena and remanded the case for further proceedings. App. 1a-50a. The court held that a witness who has a real and substantial fear of prosecution in a foreign country may assert the Fifth Amendment privilege

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[1] As the court of appeals recognized, "[s]ince a deportation proceeding is a civil action and not a criminal prosecution, [respondent] did not have a Fifth Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him." App. 8a (citation omitted).

[2] In 1992, Lithuania adopted a statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. See App. 61a-62a & n.9. Israel imposes the death penalty on persons who "'during the period of the Nazi regime, in an enemy country,' committed crimes against the Jewish people." See App. 64a-65a & n.11. Germany has prosecuted persons suspected of crimes against Jews during World War II under its murder statute, although it is uncertain whether the statute may be applied to non-German citizens alleged to have committed murder outside Germany. See App. 63a-64a & n.10.

against compelled self-incrimination to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of criminal prosecution in this country. App. 2a, 40a. The court acknowledged that other circuits had reached a contrary conclusion. App. 10a-11a (citing *United States* v. *Under Seal (Araneta)*, 794 F.2d 920 (4th Cir.), cert. denied, 479 U.S. 924 (1986); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970)).[3]

The court of appeals initially concluded that "[t]he language of the Fifth Amendment makes no distinction between self-incrimination in domestic and in foreign prosecutions." App. 8a. The court then turned to the question "whether allowing those who have reasonable fear of foreign prosecution to invoke the privilege 'promotes or defeats [the] policies and purposes'" served by the privilege. App. 15a-16a (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964)).[4] First, the court found that "[p]ermitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual every bit as much as allowing the privilege in cases where the fear is of domestic prosecution." App. 16a. Second, the court reasoned that "[t]he systemic policies of American criminal justice that underl[ie] the Fifth Amendment"—such as the "state-individual balance" in criminal trials—"are neither promoted

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[3] The Eleventh Circuit's conflicting decision in *United States* v. *Gecas*, 120 F.3d 1419 (1997) (en banc), was issued after the Second Circuit's decision in this case.

[4] The United States did not challenge the district court's finding that respondent has a real and substantial danger of prosecution by Lithuania and Israel. App. 7a.

nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution." App. 17a. Third, the court decided that allowing persons who fear foreign prosecution to invoke the privilege furthered the purpose of preventing government overreaching. App. 17a-22a. The court believed that, given the "[i]nternational collaboration in criminal prosecutions" in recent years, the government may have an incentive to use "abusive measures" to extract confessions for use in foreign prosecutions. App. 18a-21a.[5]

The court rejected the view of other circuit and district courts that domestic law enforcement would be seriously undermined if witnesses could invoke the Fifth Amendment privilege based solely on a fear of foreign prosecution. App. 26a-28a. The court acknowledged that allowing such witnesses to invoke the privilege "has costs for domestic law enforcement," because the United States cannot compel the witness's testimony by granting him immunity from foreign prosecution, as it can from domestic prosecution. App. 27a. But the court found "the strength of this objection to be exaggerated" (*ibid.*) for several reasons: that those cases in which a witness can establish a real and substantial fear of foreign prosecution "rarely occur" (App. 29a); that a witness could ordinarily invoke the privilege only with respect to foreign activities, whereas the principal focus of domestic law enforcement is on activities in

[5] The court also found "significant support" for its view in *Murphy*'s "statement and acceptance of the English common law rule" that the privilege against compelled self-incrimination applied whether the witness was under a threat of domestic or foreign prosecution. App. 23a-25a (citing *Murphy*, 378 U.S. at 63).

the United States (App. 31a); and that the government could ask that adverse inferences be drawn against a witness in a domestic civil proceeding based on his refusal to testify (App. 32a-33a). The court also suggested that Congress and the Executive Branch could "limit dramatically the domestic law enforcement costs of the interpretation of [the] Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes." App. 39a.[6]

Judge Meskill concurred in the result. App. 49a-50a. He cautioned that "our decision today should not be interpreted as *carte blanche* for honoring a Fifth Amendment privilege against self-incrimination in all domestic proceedings where the recipient of the subpoena has a well-founded fear of foreign prosecution" because "[o]ther scenarios may call for a different result." App. 49a. In his view, "[the] decision should be limited to the facts before us and to OSI proceedings." App. 49a-50a.

District Judge Block wrote a concurring opinion, which Judge Calabresi joined. App. 43a-48a. Judge Block "express[ed] [his] concern, triggered by Judge Meskill's concurrence in the result, that [the] decision today may be perceived as qualifying the privilege in cases involving a real and substantial fear of foreign prosecution based upon a case-by-case analysis of domestic law enforcement." App. 43a-44a. In his view, the application of the Fifth Amendment

[6] The court also held that respondent had not waived the Fifth Amendment privilege by answering questions, under oath, concerning his World War II activities in his 1961 visa application. App. 40a-43a.

privilege to any witness who faced a real and substantial danger of foreign prosecution is "unqualified." App. 45a. After acknowledging the contrary positions of the Fourth Circuit in *Araneta* and of the district court in *United States* v. *Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), Judge Block observed that "the debate on this issue * * * will continue until resolved by the Supreme Court." App. 44a-45a.

REASONS FOR GRANTING THE PETITION

The Second Circuit held in this case that a witness who faces no danger of criminal prosecution in the United States may nevertheless invoke the Fifth Amendment privilege against compelled self-incrimination, and thereby avoid testifying in a domestic civil proceeding, if his testimony may incriminate him in a criminal prosecution by a foreign country. In allowing the Fifth Amendment privilege to be invoked based solely on a witness's fear of foreign prosecution, the Second Circuit's decision squarely conflicts with decisions of the Fourth, Tenth, and Eleventh Circuits. Moreover, the Second Circuit's expansive interpretation of the Self-Incrimination Clause creates a substantial impediment to domestic law enforcement, particularly where the government seeks to obtain testimony from accomplice witnesses in the growing number of cases involving criminals who operate internationally. The importance of the constitutional issue presented in this case is indicated by this Court's noting of probable jurisdiction to address the issue in *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), although the Court ultimately disposed of the case without reaching the issue.[7]

1. The Second Circuit's decision in this case directly conflicts with the decisions of three other courts of appeals. Most recently, the Eleventh Circuit held, on what the Second Circuit recognized to be "facts very similar to those in th[is] case" (App. 11a), that a witness may not invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of foreign prosecution. *United States* v. *Gecas*, 120 F.3d 1419 (1997) (en banc). Like respondent in this case, Gecas was a resident alien whom OSI suspected had illegally obtained admission to the United States by concealing assistance in Nazi persecution of Lithuanian Jews during World War II. *Id.* at 1422-1423. And he likewise was found to have a real and substantial fear of prosecution and conviction in a foreign country. *Id.* at 1427.

The Eleventh Circuit held that a prosecution is not a "criminal case," within the meaning of the Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself," if the prosecution does not occur in a jurisdiction that is subject to the Fifth Amendment. 120 F.3d at 1457. Because Gecas faced a danger of prosecution and conviction only by countries that are not themselves subject to the Fifth Amendment, the court held that "the Fifth Amendment's Self-Incrimination Clause does not extend to Gecas' real and substantial fear of foreign conviction." *Ibid.* In

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[7] See also *Araneta* v. *United States*, 478 U.S. 1301, 1303 (1986) (Burger, C.J., in chambers) (granting stay on ground, *inter alia*, that "four Justices will likely vote to grant certiorari on the issue"), stay vacated, 479 U.S. 924 (1986).

so holding, the court rejected Gecas's argument that the "main purpose" of the self-incrimination privilege is "the protection of individual privacy and dignity," so that an individual has the "freedom to remain silent * * * regardless of where the infliction of criminal penalties will occur." *Id.* at 1435. After an exhaustive examination of the history of the privilege (*id.* at 1436-1456), the court concluded that the privilege "was intended as a limitation on the investigative techniques of government, not as an individual right against the world." *Id.* at 1456.[8]

The Second Circuit's decision in this case also conflicts with decisions of the other two courts of appeals that have decided the constitutional issue. In *United States* v. *Under Seal (Araneta)*, 794 F.2d 920, 925-928 (4th Cir.), cert. denied, 479 U.S. 924 (1986), the Fourth Circuit held that a witness may not invoke the Fifth Amendment privilege based solely on a real and substantial fear of criminal prosecution by a foreign country. See also *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1112 (4th Cir.), cert. denied, 484 U.S. 890 (1987); *United States* v. *(Under Seal)*, 807 F.2d 374, 375-376 (4th Cir. 1986). The Tenth Circuit has similarly held that "[t]he fifth amendment was intended to protect against self-incrimination for crimes committed against the United States * * * but need not and should not be interpreted as applying to acts made criminal by

[8] The en banc court was closely divided in *Gecas*. Five judges joined the majority opinion, and another concurred specially in the result. Five judges dissented in two separate opinions.

the laws of a foreign nation." *In re Parker*, 411 F.2d 1067, 1070 (1969), vacated as moot, 397 U.S. 96 (1970).[9]

2. The Second Circuit erred in extending the protection of the Self-Incrimination Clause to a witness who invokes it based solely on a fear of foreign prosecution. The Fifth Amendment's reference to a "criminal case" does not encompass foreign prosecutions. Nothing in the Fifth Amendment, the Bill of Rights, or the Constitution as a whole suggests that the Framers intended the Clause's protection against compulsory self-incrimination to have a broader scope than other provisions of the Bill of Rights, which apply to domestic trials but not to criminal prosecutions in foreign countries. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 784-785 (1950) (declining to apply the Fifth Amendment extraterritorially in a habeas case by aliens arrested, prosecuted, and convicted abroad of war crimes). Instead, just as the phrases "all criminal prosecutions" in the Sixth Amendment and "Suits at common law" in the Seventh Amendment apply only to domestic criminal and civil proceedings, the phrase "any criminal case" in the Fifth Amendment does not encompass foreign criminal cases brought by foreign powers.

[9] See also *Phoenix Assurance Co. of Canada* v. *Runck*, 317 N.W.2d 402, 413 (N.D.) (holding that "the fifth amendment privilege, in the absence of a treaty or understanding, does not apply to possible foreign prosecution"), cert. denied, 459 U.S. 862 (1982).

The Self-Incrimination Clause applies only where the witness fears prosecution by a sovereign that is itself subject to the Fifth Amendment, *i.e.*, the federal or state governments. In cases decided before the Court applied the Self-Incrimination Clause to the States through the Fourteenth Amendment, see *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court held that a fear of prosecution in a jurisdiction not covered by the Fifth Amendment did not justify invocation of the privilege. *United States* v. *Murdock*, 284 U.S. 141 (1931) (federal witness could not invoke privilege based on fear of a state prosecution); see also *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958) (state witness could not invoke privilege based on fear of federal prosecution). Under those authorities, the Fifth Amendment did not apply unless both the compelling government and the using government were bound by the Fifth Amendment.

This Court overruled *Murdock* and *Knapp* on the same day that it decided *Malloy* v. *Hogan*, *supra*. See *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964) (holding that Fifth Amendment privilege "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law"). But given the Court's holding in *Malloy* that the Self-Incrimination Clause applies to the States, it remains true that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination." *Araneta*, 794 F.2d at 926; see *Murphy*, 378 U.S. at 57 n.6 (noting that the case involved a "'compelling' government" and a "'using' government" that were both bound to recognize the

Fifth Amendment privilege). Because the Fifth Amendment does not restrain foreign governments from compelling and using self-incriminating testimony, the Fifth Amendment's protection does not attach to a fear of incrimination in a foreign prosecution.[10]

The policies underlying the Self-Incrimination Clause in the domestic context do not justify an extension of its protection to fears of foreign prosecution. While the court of appeals found a parallel between the "cooperative federalism" noted by the Court in *Murphy* and the "cooperative internationalism" it believed currently exists in law enforcement, the two contexts are significantly different. In domestic criminal cases, the compelling authority (federal or state) can grant immunity from use of the compelled testimony, so as to permit the sovereign that has need of the testimony to obtain it. See *Murphy*, 378 U.S. at 78-79; *In re Grand Jury Proceedings*, 860 F.2d 11, 14-15 (2d Cir. 1988) (grant of immunity under 18 U.S.C. 6002 bars the use of the compelled testimony in both state and federal criminal proceedings).

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[10] *Murphy*'s acceptance of what the Court understood to be "[t]he settled English rule" that a witness could invoke the privilege "where there is a real danger of prosecution in a foreign country" (378 U.S. at 67, 77) does not control the decision in this case. Quite apart from the doubt that exists about *Murphy*'s understanding of English law, see, *e.g.*, *Araneta*, 794 F.2d at 927; cf. *Murphy*, 378 U.S. at 81 n.1 (Harlan, J., concurring in the judgment), a different result is dictated here by the text of the Constitution, and the danger of preventing the acquisition of evidence for domestic law enforcement based on the potential collateral use of such evidence in foreign prosecutions.

The same does not hold true in the context of foreign prosecutions. Neither the federal government nor a State has the authority to grant a witness immunity against prosecution by a foreign sovereign. Nor can any court in the United States exercise its supervisory power to adopt an exclusionary rule prohibiting foreign sovereigns from using the compelled testimony of a witness granted immunity by the federal government or a State. In contrast to the situation in *Murphy*, under the Second Circuit's view, a witness who has been granted immunity from domestic prosecution may still refuse to testify based on a fear of foreign prosecution, and the federal government and the States will be constrained in their ability to investigate and prosecute violations of their laws by virtue of the potential actions of foreign governments.

3. The question presented in this case is thus of considerable importance to the domestic law-enforcement interests of the United States and the individual States. See *Murphy*, 378 U.S. at 79 (noting that "the interests of the State and Federal Governments in investigating and prosecuting crime" must be taken into account in determining scope of Fifth Amendment privilege). The Second Circuit suggested that its rule would not impede domestic law enforcement, because "it is difficult to establish a real and substantial fear of criminal prosecution abroad." App. 30a. But while the requirement that a witness establish a real and substantial fear of foreign prosecution would weed out some insubstantial and manufactured claims of privilege, that would merely decrease the number of potentially valid claims. It would not diminish the impediments to federal and state law enforcement created by allowing witnesses

to avoid testifying if they can satisfy that requirement.

Those impediments are substantial. The United States is increasingly the target of criminals operating internationally. The Second Circuit's extension of the Fifth Amendment privilege to protect a witness against a fear of foreign prosecution will adversely affect the government's ability to prosecute crimes that cross national borders, particularly since the privilege "not only extends to answers that would in themselves support a conviction under a * * * criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a * * * crime." *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). For example, in a case involving a foreign national accused of operating a cartel that smuggled illegal drugs into the United States, the smuggler's underlings could avoid testifying against him by asserting that they could be prosecuted in their native country. Cf. *In re Grand Jury Proceedings 82-2*, 705 F.2d 1224, 1225 (10th Cir. 1982) (witness sought to avoid testifying before grand jury regarding "illegal laundering of narcotics money inside and outside the territory of the United States" based solely on fear of foreign prosecution), cert. denied, 461 U.S. 927 (1983). Or, a "renegade [foreign sovereign] seeking to protect the bosses of a drug cartel or the leaders of a terrorist organization" could impede the enforcement of United States law by disingenuously "threatening the prosecution of lieutenants granted immunity" by federal or state authorities. *United States* v. *Lileikis*, 899 F. Supp. 802, 807 n.9 (D. Mass. 1995); cf. *Araneta*, 794 F.2d at 921 (relatives of former Philippine President Marcos asserted fear of foreign

prosecution to avoid testifying in grand jury investigation into corruption in arms sales between U.S. companies and the Philippines).

This Court has observed that the government's ability to grant immunity is "essential to the effective enforcement of various criminal statutes," because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar* v. *United States*, 406 U.S. 441, 446, 447 (1972). Because the United States cannot grant a witness immunity from foreign prosecution, however, the Second Circuit's extension of the Fifth Amendment privilege would, in many cases, deprive the government of vital evidence.

As this case illustrates, the Second Circuit's decision also deprives the government of an important tool in immigration and other civil matters. The government frequently relies on deposition testimony in denaturalization and deportation actions. Under the Second Circuit's decision, many witnesses summoned for a deposition in such cases may claim that they are subject to foreign prosecution and thereby avoid giving testimony that the government otherwise would have a right to obtain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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